EXHIBIT B-173

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA)
) **CASE NO.:** 2022-EX-000024
VS.)
)
BRIAN B. KEMP)

ORIGINAL

SPECIAL PURPOSE GRAND JURY

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE ROBERT C.I. MCBURNEY

ON AUGUST 25, 2022, ATLANTA, GEORGIA

APPEARANCES:

FOR THE STATE:
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FM MCDONALD, ESQ.
ADAM NEY, ESQ.
WILL WOOTEN, ESQ.
ATTORNEYS AT LAW

FOR THE DEFENDANT:
S. DEREK BAUER, ESQ.
BRIAN F. MCEVOY
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THE COURT: This is 2022-EX-000024, and we are here having a hearing this morning concerning a motion that has been filed on behalf of Governor Kemp by his lawyers seeking to quash a subpoena that has been issued for his appearance before the special purpose grand jury that is investigating alleged electorial interference in Georgia's 2020 general election. Why don't we start -- because I think there may have been some last minute additions to the ranks of lawyers here -- by having counsel for the governor introduce themselves, get themselves on the record and we'll figure out who from the State, meaning the district attorneys, will be confusing with the State here, who from district attorney's office will be talking as well?

MR. MCEVOY: Good morning, your Honor. Brian McEvoy on behalf of the Office of the Governor.

MR. BAUER: Good morning, your Honor. Eric Bauer, also for the office of the governor.

MR. MCEVOY: We are also joined by David Dove, Executive Counsel for office of the Governor.

THE COURT: Welcome all three of you.

Mr. McEvoy, you are free to divide up the

speaking anyway you want. All I ask is that only one person at a time make a point. But if Mr. Bauer's is going to be handling --I'm making it up --executive privilege and Mr. Dove's going to be talking about electoral cycles, fine. But let's try to keep the one person for topic, if that works.

MR. MCEVOY: Yes, your Honor. Just for your Honor's understanding, Mr. Bauer will be handling the immunity, sovereign immunity. Mr. Dove is just here as a client representative. He can answer any questions that your Honor may have, and I will likely be handling the other components.

THE COURT: Sounds good. Good morning.

MR. WADE: Good morning. Nathan Wade here for the State, along with Donald Wakeford here for the State. And with us will be Will Wooten and Adam Ney, District Attorney for the State as well. The arguments will be handled by Mr. Wakeford and myself if that's okay with the Court.

THE COURT: It is okay. Same rules, just try to keep one person per topic or at least have a clear dividing line so that Ms. Rivers can more readily follow along.

MR. WADE: Yes, sir.

THE COURT: So Mr. McEvoy, I'm going to hand it over to you in a minute. Just so you know I've read the motion and the response. I can't say I've read all the e-mails. I don't particularly hear a lot about the e-mails, but it may be germane, and so I don't mean don't talk about them, but we don't need to get down into, well, that's when he called me a name in an e-mail from August 14th. I get the drift with what the e-mails were about, those that were included and those that weren't, etc. But in terms of the thrust of the arguments made by the office of the governor in order of appearance sovereign immunity, executive privilege, attorney/client privilege, and then interference with the electoral cycle. You can handle them in any order you want. The way I process them was the way they were in the brief, and the basic argument is that the governor hasn't waived his immunity from, I guess, what we'll be discussing how a subpoena in connection with a criminal investigation is a lawsuit. But that's why you handed that one to Mr. Bauer. Then we can talk about executive privilege, it's existence and application in the state of Georgia. And then we'll manage attorney/client whatever way you want.

The same with the concerns about scheduling, okay.

MR. MCEVOY: Thank you, your Honor. I had some introductory remarks that I don't think really are necessary. I think Mr. Bauer could probably go into the sovereign immunity argument.

THE COURT: Great. And I guess what I'll do, while Mr. Bauer strides to the podium, is if we get deep enough in the sovereign immunity I may turn to the district attorney's office to get their response to that topic rather than have the governor's office cover all four, and then I'm trying to remember what was said about sovereign immunity. So, Mr. Wakeford, Mr. Wade, just be ready. It may be you're bouncing up four times rather than once.

MR. MCEVOY: Your Honor, just one housekeeping item. We do have a -- sort of a Power Point and some exhibits that we may or may not go through. I've got a complete set for the State and a complete set for your Honor.

THE COURT: To that end, the best way to share things would be to join the Zoom session and I think you've got that link. And if you did, then you can share your screen. I currently have you in the Zoom call, but maybe your law firm has a way

that's penetrating our Zoom system from a satellite somewhere and it's going to come that way.

MR. MCEVOY: We'll figure that out.

Can I approach just to give your Honor hard copies?

THE COURT: But please like don't plug things into things because that may disconnect something. So the best way is to join the Zoom and then share screen.

MR. BAUER: Good morning, your Honor. It's a pleasure to be here. As you know, the governor's motion to quash the subpoena is on three grounds: Lack of jurisdiction, that's sovereign immunity, improper purpose, and failure to accommodate important privileges. As Mr. McEvoy just reported to you, I'm going to address the jurisdiction issue, and he is going to speak to the other issues.

As the Court knows from the papers, we believe the century old doctrine of sovereign immunity precludes the county district attorney from using the superior court's impulsory process to subject a sitting governor to an inquiry regarding the performance of his official duty absent some expressed waiver does not exist. I

know that the Court is deeply familiar with the doctrine of sovereign immunity. I know you just issued a detailed order in which you had to emerse yourself in it.

THE COURT: Had a recent crash course.

MR. BAUER: That's right. In another matter.

THE COURT: Thank you, solicitor general.

MR. BAUER: I do not intend to bark at the Court about things the Court already knows well because I do think this issue may be destined for additional review at some point one way or the other. I hope you will indulge a little bit of exposition on that issue. I do feel like to start off, and I think Mr. McEvoy may have been intending to do this in his opening remarks, but you indicated in response to the motion that was filed it's a bafflement as to why we're in the position we're in. Why you were getting a motion to quash on sovereign immunity at this point in this investigation, and --

THE COURT: And by point I meant on the eve of the appearance date that had been carefully negotiated with input from the governor's office at governor's counsel request.

MR. BAUER: Correct.

THE COURT: Just so everyone understands --

MR. BAUER: Absolutely. Stuff could change and that was an issuance of a subpoena, and Mr. McEvoy will speak to the relevant details of those communications and what the governor's agreement or agreement he thought he had with the district attorney's office was on that. But we're equally frustrated. When we got that subpoena we were equally baffled because there are some serious limits to the authority of a special purpose grand jury. And I think more relevant here the authority of a local county prosecutor when you're talking about using the court's process to compel the sitting governor to do anything in relation to his official duties. And so once that subpoena was issued, and we believe it was ultra vires, the motion became necessary. And I just want the Court to know that its frustration is shared.

THE COURT: So the subpoena flowed from the scheduling discussions we had that yielded the date that was suppose to work for both the governor and his lawyer. It was after that discussion that the subpoena -- I was under the impression that

there had been a subpoena but people just agreed we're going to change the date because there was conflict X, conflict Y, conflict Z.

MR. BAUER: That's not what happened.

THE COURT: So there's only been one evidence subpoena.

MR. BAUER: There was a document subpoena.

MR. MCEVOY: Your understanding is correct, your Honor, and I can address those logistical issues which were there in part exacerbated by my own personal travel. I'm happy to talk about it now or later.

THE COURT: No, no, no. I -- Mr. Bauer's helping me understand why the motion came when it did, and there was something that changed, and that was a subpoena. So was it -- I may be asking questions. I'm not trying to do this to you that are Mr. McEvoy's questions, but was it the plan that the governor was going to appear on that date which I think was last week without a subpoena? In other words, he wasn't asking for one and then -- and the District Attorney's Office can explain its own actions-- belt and suspenders-- hey we got this understanding, but let's send a subpoena anyway just to memorialize. You don't

need to answer for the DA's Office, but I guess more bafflement. If everyone had agreed that this is the date that the governor is going to come in and testify before the special purpose grand jury as did his secretary of state as -- but the secretary of state, other people. If the only thing that changed was well, let's make it official. Here's an invitation. It's a subpoena, but it's an invitation. What -- I guess, I'm confused if there was an understanding that he was coming anyway, the subpoena -- he could say I don't need that subpoena. But now that it's a subpoena he doesn't want to come. I guess I need to understand that.

MR. BAUER: Mr. McEvoy's going to explain that to you in crystal clear detail, but there wasn't firm understanding. There had not been an agreement on that date or the terms of appearance. The subpoena was new. It was not by agreement. It was not invited, and it was not welcomed, nor do we think it's necessary. But more important for legal issue in front of you today, it's not legally proper. So, the governor's position is very straight forward. Sovereign immunity is jurisdictional. No court can exercise jurisdiction

over state or it's chief executive without consent in the form of constitutional waiver or statutory waiver that meets the criteria that the Court is familiar with for such a statutory waiver.

THE COURT: So, true with lawsuits. Maybe you're getting there. I know you're getting there. Let's get there. Because to me the real issue here is how does sovereign immunity apply if at all in the criminal context. I want to be very clear. No suggestion that the governor or his office is connected to criminal activity. I think if one were to summarize the theory of the investigation the governor was almost the target of the targets. And so it would be lower case v-victim of pressure to do things that one theory is working proper post election. But it's in the criminal context, and so I did look long and hard at all the cases that were cited and they all involve someone trying to sue governor, the state, whatever it is, lawsuits, civil action. And apart from the email exchanges there's not a whole lot civil about what's going on with the grand jury right now.

MR. BAUER: I'm going to address that particular point, the specific language suit,

lawsuit action where that shows up.

THE COURT: Okay.

MR. BAUER: Why that's not the limitation. I think it would be crystal clear when I'm done. But I think given the DA's opposition what they filed late Tuesday -- I think I need to take a step further back. And while, as you know, our motion was based on jurisdictional issues arising from sovereign immunity, the opposition that the District Attorney's Office filed I think has raised another issue that we have to educate the Court about today, which is the fundamental statutory limits of a special purpose grand jury and it's authority and by extension the DA. So, their opposition appears to be based on two things. One, a fundamental misunderstanding of the grand jury and the county DA's authority. And to a narrow reading of the word "suit" the issue you just raised, that's neither legally, historically, contextually, logically historic. And I have a few of those in that order to educate the court.

THE COURT: Sure.

MR. BAUER: I read the special prosecutor's brief Tuesday night, and read it again last night. And what jumps out at me is they think

their authority is unlimited if what they're doing is (a) a criminal investigation, and (b) their investigation. And there are no constitutional separation of powers or sovereign immunity or statutory limits on that jurisdiction and authority if what they're doing is a criminal investigation.

THE COURT: Well, I think that overstates it a bit. We've been navigating. There are all sorts of limitations. There's attorney/client privilege. There's legislative privilege, etc. And the district attorney's office has pushed against that, but ultimately acknowledged that there are certain things that even in the 5th amendment privilege that stand in the way of unfettered inquiry with the witnesses who do appear in front of the grand jury.

MR. BAUER: You only get that far. You only get to analyze whether they have to respect the privileges if they had -- or more importantly the special purpose grand jury has the authority to do whatever it's doing anyway.

THE COURT: Agreed.

MR. BAUER: And we've got to go back now and look at what that authority is because their position is that as long as what they're doing in a

criminal investigation there are no limits on that and they could haul in the governor and they don't have to pay attention to these other jurisdictional constitutional issues. It's wrong on every level. Starting with, this is actually not a criminal investigation. So, slide one I put up here for you, this is a civil investigation. And in civil investigations a special purpose grand jury and the district attorney's that's aiding it have no authority under established Georgia law to investigate state offices. They simply don't. I said civil, and I saw the Court's reaction to it, but that is what a special purpose grand jury does. And I think the Court has actually recognized this, albeit indirectly, it's one of your other orders in this matter. They keep saying it's a criminal investigation and it's their investigation and it's neither. The investigation -- and understanding why those are both wrong is crucial to understanding what the special purpose grand jury is authorized to do and what it's not. And we got to look at that before we even get to can they use it to haul the sitting governor into testify about its duties. So, we're lucky the Georgia appellate courts have actually answered this question for us.

So, number (1), it's a grand jury investigation. It's not a DA investigation. While the DA aids it, it's the grand jury that investigates. I know the Court is very familiar with that construct. And because it is a special purpose grand jury investigation, it's by definition is civil and it's not criminal no matter how they want to dress it up. This is because the special purpose grand jury is a civil investigative body only. It has no power to indict. And this is what I think your Honor has noted in some of your orders in this case. It doesn't have any power to indict. It has limited power to interview witnesses, and it can only issue a report. There is simply nothing criminal about its process of investigation. And whatever it does in that process, in that ultimate report, they belong to the grand jury. They don't belong to the district attorney. So, this slide tells you what the Georgia Court of Appeals has said about the nature of the special purpose grand jury, and there is a number of cases about them. The first one was the State vs. Bartell case from 1996, in which the Court of Appeals was trying to figure out does it matter whether this grand jury came under the special purpose statute or the

regular grand jury statute. And they said, no, it doesn't matter. Because what this particular grand jury, the regular grand jury's doing was civil, not criminal in this particular case. Either way, we don't have to add to that question, but special purpose grand jury's only do civil investigations because they can't indict. That was reinforced Kennerly vs State in 2011.

THE COURT: Why does the lack of power to indict -- I agree with you that the special purpose grand jury cannot bring charges, and we've had to explain that to -- through witnesses, to all sorts of folks. Why does that mean it's not a criminal investigation or criminal investigative body as opposed to civil? Wouldn't one look to -- I'll call it the charter. So, the chief judge signed an order authorizing the creation of the special purpose grand jury and its purpose was not to investigate civil matters; it was to investigate alleged criminal interference with the 2020 general election. So criminal, criminal, criminal, not civil, civil, civil. What -- why is simply the lack of the ability to -- a police officer cannot indict anyone. But if a police officer is asking you questions that's not civil investigation, it's

a criminal investigation.

MR. BAUER: Sure. And it would trigger different constitutional concerns obviously. And you know, the court of appeals cases that have answered this, and they are the only cases in the State that have actually looked at the nature of the special purpose grand jury on this question. They haven't expanded, you know, particularly helpfully on that distinction. But I think the reason is because particularly when you're investigating state or even local government actors who have special immunities that ordinary citizens may not have, then criminal versus civil, the nature of the investigation in the grand jury does become a structural issue with respect to, you know, are you subject to jurisdiction. And if it's civil, if you're talking about government officials acting in the course of their official duties in a civil investigation, particularly when you're talking about the state, sovereign immunity is a bar. And so, I think this rule is recognizing that when you are investigating a criminal act and you have probable cause to believe there's been a crime committed, by definition that's outside the scope of an official state duty. And so, I think that's

where the court's are drawing that distinction and answers your question. But we don't have clarity from the appellate courts about your specific question, is it indictment or no. But in these cases, and I'll urge the Court to read them, they say if the grand jury can't indict, if it can't make a presentment, and all it can do is issue a report, then it's civil, it's not criminal. And they view that distinction as important. But here's why it's particularly important in this case.

THE COURT: What about on the federal level? Because I know this isn't your space, but this executive privilege is being imported from a lot of federal cases. So, federal grand jury's they can investigate civil. They can investigate criminal. If it is a criminal investigation at the federal level, but it's merely designed -- I guess it's tricky because that -- there are no special purpose grand jury's. That grand jury is a multipurpose tool. It may be used at that point only to investigate. And the U.S. Attorney's gathers enough information and says we choose not to present an indictment to that grand jury. But what do you know about what federal case law says

about sovereign immunity and a federal grand jury if the focus is criminal activity? Not, hey, should we have remunerated people's whose land we took more, but it's focused on a RICO allegations?

MR. BAUER: I know enough to be dangerous.

THE COURT: For your side or the other side.

MR. BAUER: For everybody. I don't want to tell you, you know, with certainty that I'm about to tell you an issue of law that I'm correct on, particularly with respect to a federal criminal investigation of a sitting executive office of the president. I think the Supreme Court has said you can't do that while the president is in office.

THE COURT: But this is not an investigation of the governor. It's not an investigation of the governor. Again, the -- as I understand the theory of the investigation, if the governor were to fall into a category, it would be victim, in his official capacity. So, that's not the right framework. Because I understand that there might be limits to say you can't -- executive and executive. But Department of Justice you cannot use a grand jury against a sitting

executive president to investigate that individual. But that's not this situation.

MR. BAUER: It's not. And I think the federal cases that are applying sovereign immunity through to subpoenas give you that road map. They are telling you that unless the State has said one of our people can be a witness in your proceeding, without sovereign immunity being waived you can't do that. But, you know, the Federal Court -- the Supreme Court has looked -- is interesting to see they've cited the Paula Jones case against Clinton. We can haul in a sitting judge if we want to, and the Supreme Court has said that conduct has nothing to do with the discharge of his official duties. You can call him in for a deposition, but I think they said that case aint going to trial until he's out of office. Because you cannot interfere with the performance of his official duties. I don't think this is any different, and Mr. McEvoy could talk about the ethical guidelines that go to prosecutions and why they are separate and apart from whether there's a Supreme Court case that says federal grand jury's can't haul in the president to be a witness in the investigation of some other person's crime. DOJ guidelines say you don't do

that during election season. Even if you got a really good reason to talk to somebody, if they're in an election and you have authority to talk to them, you still don't do it.

THE COURT: We're getting off topic. We'll get to that.

MR. BAUER: So, here's the problem. You've got these cases.

You can go to slide two, please.

You've got these two cases that come out of the Georgia Court of Appeals. It's a Floyd County case. They're related to a grand jury that Floyd County had. There are two different grand jury's, two different cases. But what the court of appeals said in these two cases -- and one you can look at in particular is: In Re Floyd County Grand Jury presentments for May term 1996. 245 Ga. App 705. At the bottom of the screen. Court of appeals said, look, you're a county grand jury. You do not have any statutory authority to investigate state offices or state officers. Particularly -- that the one I just quoted you was a special purpose -- was not a special purpose grand jury, but it was conducting a civil investigation just like this special purpose grand

jury has to do. And says you can't use a civil investigation, local grand jury to write a report that is derogatory to a state officer. That is beyond the scope of your authority. You can't do it.

THE COURT: You keep calling it a local grand jury. What is the local part other than to make it sound like we're out in the sticks.

MR. BAUER: Well, I think because there's a distinction and a hierarchy of sovereignty of the state. And state and subordinate political bodies, and a county grand jury, which is authorized by a county superior court judge, who by all means whose authority we respect greatly --

THE COURT: But that wasn't my point. But there's no other grand jury in Georgia. There's federal.

MR. BAUER: That's right.

THE COURT: And there's a state grand jury. It doesn't have statewide authority necessarily, but I just want to make sure I wasn't missing something that the attorney general believes -- well, I actually could convene a special, special grand jury that has statewide --

MR. BAUER: It's a grand jury that is

required to be convened by a county superior court judge who's elected by a local county electorate, not statewide, in overseeing generally -- unless there's an attorney general involved -- by a local county prosecutor. And so I think what this case is saying is look, these two cases. You can't -- the State has not suborned its sovereignty to these local bodies in this way. If you're going to investigate the State in this state that authority rests with the attorney general, the governor, ironically, and the general assembly. And each of them have been given that authority by statute or constitution or both. So, you can look at them. O.C.G.A. 45-15-17 is the statutory authority that says attorney general you can investigate state offices. And then 19 is general assembly, you can do it, too. What you won't find and what these cases say you can't do is have a county grand jury doing a civil investigation of state officers or state offices. So, I point this out just because, you know, reading their position, which is as long as we think it's criminal we can do what we want and we're not bound by any limitations. Then we have to go back and look at this and say, well, wait a minute, is this a criminal investigation.

And the courts say special grand jury can't do that. And do they have the authority to go beyond their local jurisdiction and haul in state officers. And all of these statutes and these court of appeals cases say you can't do that. You cannot usurp the authority of the AG and the general assembly or the governor for yourself as a state prosecutor.

THE COURT: Because in Floyd County they were investigating DFACS, which is a state agency, and it was an investigation into the operations of the state agency, etc. which that grand jury thought, hey, we're able to inspect our clerk's office. And I don't know what gave them the wild hair to go after DFACS. Again, not this situation.

MR. BAUER: So -- but what they were doing -- they could still subpoena records from DFACS. It's interesting that the grand jury's authority does allow them. Specifically, it trust you to get documents from state departments. But what it can't do, and what this court says was quashed in that case was, you can't subpoena DFACS employees. We weren't even talking about head of DFACS. We're talking about low level people.

THE COURT: Right. Investigation into

the operation of DFACS as opposed to an investigation into maybe there was a hacking attack on DFACS. And so they're just trying to figure out, hey, you were a victim of hacking. Tell me what you saw on your computer screen when the ransom ware appeared. That's different.

MR. BAUER: Okay.

THE COURT: But who knows.

MR. BAUER: I'm sure the grand jury could have articulated a narrower way to phrase what they were trying to investigate that made it less direct on DFACS. But either way, the Court of Appeals says if you want to take it to state officials, that's the AG's purview, that's the general assembly's purview. That's not something you can do here. But that's just the statutory limits that the courts have put on grand jury authority. And there's no recognition of it at all or the fact that the special purpose grand jury is civil by definition. Can't be anything else in --

THE COURT: And you say that because of Bartell?

MR. BAUER: Bartell and Kennerly, yes.

THE COURT: Yes. Kennerly just said you can't indict, but you'd marry the two because it

can't indict it must be civil.

MR. BAUER: I think that's a clear implication of those cases. We don't even need to go there. We need to make our record. They attacked or demonstrated that they do have statutory authority to do it. We don't even have to wade through that thicket to dispose of this subpoena because sovereign immunity is not structural. It's not based on suit or lawsuit or action or claim or any of those, you know, words that you can interchange and are interchanged in law. It is jurisdictional.

So, could you go to slide three, please.

I know the Court's aware of the common-law jurisdictional doctrine. It actually predates the charter of the state of Georgia in our first constitution. But it was constitutionalize in 1974. So we don't have to worry about is it common-law or is it constitutional. It is constitutional. And it is jurisdictional. The McConnell case from 2017. And Conway case makes it very clear that it's not structural, it is jurisdictional as do half a dozen other cases in the state that have reviewed it.

Now, the special prosecutor argues that

sovereign immunity is tethered to the nature of the legal process at issue as if it matters what forum of legal process is being asserted against the State. And I'm going to show you that's not the case. The entire argument appears rooted in the issue that you've raised, which is they believe the word "suit" appearing in certain provisions in the Georgia constitution that provide for express waivers of the jurisdictional immunity means that sovereign immunity only applies in the context of an actual complaint filed naming the State or its officers as a nominal defendant. But when you look at how that word "suit" or "lawsuit"or "action," those words are actually used in the Georgia constitution with respect to the application of the jurisdictional bar, it's clear that there is no such limitation. Because the provisions in the constitution that say we, the State, are immune from jurisdiction, they don't have that language there. I'm going to show you why and where that is. And there's no other defined mechanism or process at all that limits that jurisdiction. So, you know, even if you accept his argument that suit or lawsuit means a complaint or petition or some defined cause of action, which according to Black's

Law Dictionary -- by the way that's not what those words mean. It doesn't. So, let's look at the constitution. So, this is Georgia Constitution Article 1 Section 2 paragraph 9. This is the primary provision in the constitution that provides for sovereign immunity. And up until the amendment a few years ago that constitution was the sole location in the constitution where you would find any waiver. So, the key provisions in here that actually provide for the -- they incorporate the common-law sovereign immunity are subsections (e) and to a lesser extent (f). So, let's look primarily (e) here. (E) is the actual expression of immunity in the state of Georgia. This is the source language. "Except as specifically provided this paragraph, sovereign immunity, no limitation, no suit, no action, no law suit. It extends to the state and all of its departments and agencies, the sovereign immunity of the State and its departments and agencies can only be waived by act of the general assembly, which specifically provides sovereign immunity is thereby waived to the extent of such waiver." That is not limited to any specific cause of action. As you know, you very articulately laid out the history of the Supreme

Court's look at these provisions over the last 10 years, last week. They are issuing opinions that expand the scope of that and clarify, making sure that people who are concerned that they don't know what it applies to know it applies to everything. But if you look at this source language it is not limited. It doesn't say sovereign immunity the State enjoys it only for suits, lawsuits, actions, claims. That's just simply not what it says. So where does that language come from. You can find it in the exemptions, express waivers, and only there.

THE COURT: And they're all for civil actions.

MR. BAUER: And they are specifically identified. So, the only place those limiting descriptors show up is when they are in the constitution explaining the limits of those express waivers. So, you got the constitution saying we are immune unless we tell you otherwise.

THE COURT: But immune from what?

MR. BAUER: Jurisdiction. You can't bring me into court for any reason. It is jurisdictional bar. The State is above the reach.

THE COURT: Where is there a case ever

that says that includes criminal proceedings?

MR. BAUER: It doesn't have to unless there is an expressed waiver for it. Now --

THE COURT: But then there'd be a case that says, oh, you actually can't haul this person into court for criminal proceedings because of sovereign immunity. One of these local prosecutors with a local judge would have tried it, and if sovereign immunity prevented a state actor from being hauled into court in connection with a criminal investigation you know there'd be a case about that. Your brief says nothing about that. So, I guess, that's what I -- we don't need to quibble about what "suit" means. Pick your words: Suit, action, complaint, etc. The dividing line as I understood it, civil and criminal. And there were no cases in your brief. You have mentioned no cases yet is what I would have led with. Oh, look at this case from the Georgia Supreme Court. Georgia Court of Appeals, wherever that says, hey, sovereign immunity also applies to criminal actions. Because, of course, the State is an actor in a criminal action. So, this notion of importing sovereign immunity gets kind of sticky because it's State vs. State. And I appreciate you've used the

word "local" in front of everything. If there were an indictment from the grand jury that processes the special grand jury report, that indictment wouldn't say local Fulton County. It would say state of Georgia vs. -- there's is two people. Some of them might be state actors. And I don't believe those state actors could say, oh, sovereign immunity, you can't indict me. But I could be entirely wrong. I'm just waiting to see that case that says if you're in the criminal realm sovereign immunity doesn't apply. Isn't that the argument of the District Attorney's Office?

MR. BAUER: Okay. So, that appears to be their argument.

THE COURT: So pretend it's my argument now. Say why that doesn't work.

MR. BAUER: Just because you label it criminal doesn't make it a criminal proceeding.

THE COURT: And that's your argument that, look, this special purpose grand jury is actually a civil thing. And if you're right, civil, I agree, sovereign immunity. I don't see any waiver anywhere. But indulge me for a moment. You know what, it's a criminal investigation. The only discussion is criminal statutes. The only

concern is was there criminal interference with a 2020 general election in Georgia. So, it's a criminal investigation. No jurisdiction.

MR. BAUER: It's an investigation into whether a crime was committed, but it's not a criminal investigation because it cannot result in any criminal indictment or presentment being made. That was the choice of the District Attorney when they opened this investigation. They chose to go to the route of a special purpose grand jury that can just write a report. That's all they can do. And that doesn't convert this into a criminal inquiry. And I don't think it's settled by any stretch that even if this were a criminal grand jury proceeding that the DA could summon the governor to it as a witness only to talk about the performance of his official duties while he sits in office.

THE COURT: I don't know if it's settled, but you haven't shown me anything that says that couldn't. I guess I'm curious if it were a GBI investigation. So, they can't indict anything either and they're trying to interact with folks, and they try to get legal process to do something. Sovereign immunity? No, you can't do it because we

haven't waived it. It's not -- I think what you're bumping up against is the fact that even though it doesn't say civil in Article 1 Section 2 Paragraph 9, sovereign immunity applies to civil action suits against the State. But if it's criminal it is the State. The State is the actor.

MR. BAUER: Justice Blackwell gave us the history lesson a few years ago.

THE COURT: And Peterson. We got a lot of history lesson.

MR. BAUER: We got a lot of lengthy decision, but they're not really complicated. And what they're saying is, and the reason we had this constitutional amendment a few years ago is that Lakeford vs. [Hugh] Case came out and basically said, sorry guys, you got nobody to sue.

THE COURT: Sue to bring a civil lawsuit against?

MR. BAUER: In that particular case, yes. But what they said was the sovereign immunity is a jurisdictional bar that is virtually absolute, broad sweep is the language they used, and dates back to the sovereignty of the King. It's not about the nature of the process or the nature of the tribunal. It's about whether the State like

the King of Old has consented to jurisdiction. Now, the King of Old couldn't be compelled into any court he didn't want to go to. We're a little more sophisticated than that. You're the King, state of Georgia, which include its chief executive, the governor. But we're going to carve a little bit out of that, and we're going to say unless the State has put it in the constitution or the general assembly has done it, and the governor ironically signs it, you're above the law as far as process and tribunal's concerned for your official duties. And this is really the keep point here. They are not trying to summon the governor to talk to him about things that were outside the scope of his official duties. They want to talk to him about what he was doing in office performing his duties. He is the King for purposes of sovereign immunity jurisdictional bar unless the constitution or the general assembly has said otherwise, and they haven't. Now, I'm --you know -- you're not going to agree with me. I don't think that the special purpose grand jury isn't criminal, it's civil. And I think that answers the question. But the governor is not above the law. He's never contended he's above the law.

THE COURT: He's just the King.

MR. BAUER: Subject to -- he's the State, right. He is not the King; he's the State. But that immunity of the State which his office has to enjoy and protect, not just for the performance of his duties but for the next governors, and the next governors. Yes, the State enjoys in the Supreme Court's words absolute immunity, unless it is consented otherwise, through these processes. General assembly or constitution, it doesn't exist. And I don't think we or the governor have the luxury of pretending that immunity doesn't exist, and it is a jurisdictional bar because it's politically convenient for him to do so. Mr. McEvoy is going to talk to you about all the efforts that the governor has made to try to engage with this investigation, but once that subpoena issue he was put in a position where he had to either enforce the law of the state of Georgia, which includes making sure that there is no inadvertent waiver or derogation of this important immunity the State enjoys and he is duty bound to protect.

THE COURT: Is there a particular reason we're having this discussion now and not when -- I

think this is how it played. I may be mistaken. The secretary of state fall under this definition. Received a subpoena. Attorney General, the chief law officer of the state received a subpoena. Why is it the King rather than his chief counsel or the secretary of state?

MR. BAUER: It's a fair question. Mr. McEvoy and I would have very much liked to have been --

THE COURT: Engaged in --

MR. BAUER: Counsel to those gentlemen before they made their decision, but they do enjoy the same sovereign immunity.

THE COURT: It could be the same argument. And they could chose to enforce it or say I'll honor the subpoena and let this grand jury hear what I have to say.

MR. BAUER: The Court is sophisticated enough to know that both of those state officers, they have had independent reasons. One primary one being the timing of the outreach.

THE COURT: Months ago.

MR. BAUER: For -- and scope. We don't know what kind of discussions their legal team had with the District Attorney before they agreed to

come talk. We don't know if they were reassured that their executive privileges, their attorney/client privileges, the scope of the questions would be limited and appropriate. We just don't know. That's questions that I think they would have to answer. But sovereign immunity is not there's to waive. And while the attorney general is one of the law enforcement officers who has a duty to uphold the law in the state of Georgia, the governor is the chief executive. And the constitution is very clear that he doesn't have the luxury of ignoring something as important to the State's continuing operations as this jurisdictional principle merely because he was going to be put in this awkward and uncomfortable situation where he's, you know, being disparaged on a daily basis for the way this process has unfolded. He did not choose to have the subpoena implicate this important jurisdictional doctrine, but it did. As soon as it was issued he was left without a choice if he was going to fulfill his constitutional duty to make sure that that immunity is upheld and protected. The Court --

THE COURT: So, I want to follow. I follow most of that. He was left without a choice.

Are you saying he, the governor, didn't have the same liberty that the secretary of state or the attorney general and could have elected -- it would have set a precedent that governor in his wisdom would have made, but could have said, all right, you know what, I'm going to showup anyway. I don't necessarily think this is something that has jurisdiction over me. It's a piece of paper that I could choose to ignore, or as you said, he had no choice but to. And I assume that was to defend --

MR. BAUER: And it's rhetorically because honestly these proceedings are suppose to be secret, the grand jury investigation. Yet, somehow this stuff plays out on the front page of the paper seemingly multiple times a week. I don't actually know whether the attorney general and secretary of state were subpoenaed or whether they were appearing voluntarily.

THE COURT: Me neither.

MR. BAUER: Mr. McEvoy is going to tell you at length what efforts the governor made to engage voluntarily with the District Attorney's Office. So, the change, the duty to make sure that he is not complicit in an unauthorized investigation exceeded its authority came when that

subpoena issued. So, you know, we kind of talked jokingly about the State being the King, and I'm not trying to suggest that the governor views himself in that way. I have to clarify because we've got lots of people watching.

THE COURT: Understood. Me neither. You were simply going historical, and the term is sovereign immunity. There is no sovereign in America, but there is a head of the government and head of the executive branch, and our duly elected governor. And that would be where sovereignty starts.

MR. BAUER: That's right. And the principal derives from the King. And so you have to understand that context to properly apply the principal here. But the governor doesn't think that he is beyond any reach of law; he is just beyond the reach of this particular subpoena because there are other mechanisms. If the State needs or wants to investigate the official activities of the governor, that legal authority does exist. It just doesn't exist with this special purpose grand jury. It exists with the attorney general, with the general assembly on multiple levels. And constitutionally, there are

proceedings. We've seen them at the national level where the legislatures can hold the chief executive accountable for violations of law or other misconduct related to the official performance of his duties. They get to do --

THE COURT: Sure. With a slightly different setting again. Again, my understanding is not that the purpose of the subpoena was to hold anyone accountable, but to gather information, investigate. It's a body that can't hold anyone accountable.

MR. BAUER: That's right. So, I'm going to wrap up, I think, with that point. You know, the governor wasn't looking for an unnecessary fight with an important branch of his administration. But he does need to defend the important constitutional and statutory limits of the grand jury's authority to protect the next sitting governor from what I'm not suggesting its misuse here. Some might. But the next governor needs to know that his office is protected from, perhaps, an over zealous administrator of a special purpose grand jury. So, we're here asking the Court to follow the clear law, what we think is the clear law of the state and hold the special purpose

grand jury to that law, to its statutory limits and to its jurisdictional limits. We think the subpoena is ultra vires. It's due to be quashed for lack of jurisdiction. And I will leave the Court with this. You know, it's kind of where I started. If there's any doubt in the Court's mind about where these lines are drawn, we're going to need appellate clarity on this. And proper avenue here is to defer to the protection of the constitutional principles and the State's sovereignty defer to the jurisdictional bar until the appellate courts tell us that's not the right way to do this to answer the questions that you've asked. So, we would urge the Court if you have questions or concerns about the reach of sovereign immunity here, that you give us the quash order and let the State take it up if they want, and we'll get the clarity from the appropriate appellate court.

THE COURT: All right.

MR. BAUER: Thank you.

THE COURT: Mr. Wakeford.

MR. WAKEFORD: What opposing counsel just said, if your Honor has questions just quash the subpoena. But your Honor asked several questions

and I didn't hear from opposing counsel answers to those questions. So, this proceeding, which is clearly criminal, why is it civil? This proceeding which is not a lawsuit, but instead a subpoena, why does sovereign immunity apply to that? There has still not been a direct answer to those questions. And finally, where is the authority for this position? Where is the case that states that the governor can have his subpoenaed quashed on these circumstances? Well, there were not answers to those questions. So, I'm at your Honor's disposal. If you have questions for me, but our position is that this is a criminal proceeding. Sovereign immunity applies to immunity from suit.

THE COURT: What makes it a criminal proceeding? I guess what I'd like you to focus on is, it's not quite exactly where Mr. Bauer started, but page two. Bartell -- I understand what Kennerly says. Different sides have invoked Kennerly. I've invoked Kennerly. Just to let everyone know this grand jury is issuing a report, not an indictment. That's the extent of their end game authority. To me it's less clear they've extended their authority to summons people before them. What makes this special purpose grand jury a

criminal proceeding as opposed to a special grand jury. That special grand jury that was investigating something plainly civil.

MR. WAKEFORD: I think DFACS -- if you were investigating the administration of DFACS, if it declared itself a civil investigation -- first of all, the Kennerly case is --when it says the language that opposing counsel relies upon. It is interpreting Bartell. It says, Bartell says special purpose grand jury's are only civil. That's not what Bartell says. That grand jury was civil and declared itself as such.

THE COURT: Do you know what the special purpose grand jury in Bartell was tasked to do?

MR. WAKEFORD: The grand jury in Bartell actually wasn't clear which statute that grand jury was impaneled under. And the Court in Bartell ultimately says, you know, it doesn't matter because it says it's a civil grand jury. It could have been under the regular grand jury statute.

THE COURT: Does that have to do with the oaths that were administered?

MR. WAKEFORD: Yes.

THE COURT: And gosh, which provision should they have used.

MR. WAKEFORD: Right.

THE COURT: Not to dive deeper into Bartell, but what would distinguish Bartell for me is if its charter was to determine if there had been a violation of the city code in a non-criminal way with the way something has developed. It had nothing to do with alleged criminal activity.

MR. WAKEFORD: And the part of the decision in Bartell is they say we don't know which statute this grand jury was chartered under, so there is no charter. But what the oath is Bartell said is, do you swear to tell the truth in this civil investigation into the Department of Family and Child Services. It's clear. So, the Court of Appeals says, it doesn't matter. It could be under either because 15-12-100, the special purpose grand jury statute says that you can be impaneled for either. You can impanel one to investigate anything that a normal grand jury can investigate. A normal grand jury can investigate civil or criminal proceedings. So, then we look -- I mean, the language of the statute says that a special purpose grand jury can be convened to investigate any violation of the laws of this state. The impaneling order which was issued by the chief

judge of this circuit said that any violation of the laws of this state can be investigated within the subject matter that is relevant for this special purpose grand jury. And in the request from the District Attorney for a special purpose grand jury it was said over and over that there could be possible criminal disruptions to the laws of this state, and that is what it is investigating. Over and over again this has been emphasized.

Finally, you have the authority of a special purpose grand jury who is investigating criminal matters to make recommendations in its report that certain criminal charges be pursued. So to say that because of a line in Kennerly that misinterprets the holding in Bartell that this is somehow civil, and there is no amount of other authority or specific information in this case can say otherwise is -- well, it's just not true.

THE COURT: Well, let's say for a moment that it's fair to characterize the special purpose grand jury here as one that's engaged solely in criminal investigation. Why does sovereign immunity then not apply to the subpoena to the governor?

MR. WAKEFORD: Well, sovereign immunity -- if I could look to the constitution. This was cited by opposing counsel. Article 1 Section 2 Paragraph 9. "It may waive the State sovereign immunity from suit by enacting a state tort claims act." I mean, we are talking about items and matters that have absolutely nothing to do with the criminal investigation.

Additionally, this is not a suit. This is if they had meant any legal proceeding conceivable they could have said so. But this is talking about tort claims. This is talking about proceedings against the State where the State is a party. This is a subpoena to the governor as an individual about his activities as a witness to the actions of other people.

THE COURT: Well, yes. But to Mr. Bauer's point it wasn't a witness where he happens to be driving from home to work and there was an accident or he saw people in a fight. It would have -- the only reason he is connected to this is because of his official capacity. And as I understand the theory of the investigation intreaties that he exercise his authority in certain ways to benefit folks who thought that the

electoral outcome wasn't what it seem to be. So, yes, witness. And I've seen nothing that suggests the governor's anything but a witness, as in we're interested in learning from you -- subject, not target -- to get into that messy nomenclature that raises pulse rates. But it is still in connection with his official duties, which is why I think we then need to explore the concept of sovereign immunity. Because I don't think -- I think Mr. Bauer acknowledged this. If the governor had been driving home from work and had been going 90 in a 35 zone and hit someone and there was a lawsuit over that accident I -- that would be victim of accident versus the name of the governor. Not governor in his official capacity. And I don't think sovereign immunity would help him a lot there, but it certainly -- if this were a civil investigation this is the governor in his official capacity responding how ever he did to people from the outside of Georgia and inside of Georgia saying why not take this course of conduct. Why not do this. We ought to do that. So, it's -- to call as an individual unless I am --you're much closer to where this special purpose grand jury has gone, but on the surface the lay person understands it to be

the governor as governor and not as I happen to live in Georgia and these things happened.

MR. WAKEFORD: That analysis of whether acts or official acts or acts in official capacity is always undertaking when there is a lawsuit. So, to put that analysis ahead of the determination of whether this is a lawsuit or not puts the cart before the horse. It inverts the analysis, and it's just not relevant because this is not a lawsuit. This is a subpoena to ask the governor to be a witness in a criminal investigation. So, it just doesn't apply. And if it did, I'm not sure if the implications of their position have been fully thought out and explored. Because police officers are arms of the state, and they're subpoenaed to appear in court proceedings all the time. I have yet to hear that a police officer or state trooper who is an employee of state government cannot be subpoenaed to come in and provide testimony in criminal matters.

THE COURT: GBI agent.

MR. WAKEFORD: If this position is validated, the power of this court is entirely destroyed with regard to a whole host of actors. And it simply doesn't flow from logic or the way

the law is suppose to fit together. This grand jury has asked the governor to come forward in the same way that his legal advisor, under the laws of this state, the attorney general was asked to come forward. And as your Honor pointed out this is the first we are hearing of this argument. And yet, the legal advisor to the governor has come forward. At no point was there a motion before this court from the attorney general saying sovereign immunity applies to me.

THE COURT: But that doesn't make the argument a stronger or weaker argument. The timing is peculiar, but we have explored that, and Mr. Bauer, I think, helpfully reminded me there are a bunch of different reasons why different state actors would make different choices upon receiving an invitation from the special purpose grand jury. We're confronted with this motion at this point and time and the merits of the sovereign immunity argument I don't think hinge on when in the course of the investigation or even more so when in the course of the interactions in trying to get some communication between your investigation and the governor's office. It's come up and we need to engage, all of us, both sides and myself, the

merits of the argument and not so much the timing.

MR. WAKEFORD: Aside from that, your Honor, the application of the Floyd County cases which specifically speak to the regular grand jury statutes authorizing specifically civil investigations in the State offices simply do not apply under these circumstances for reasons that should be obvious. This is not a regular grand jury authorized to investigate a civil matter. It's a special purpose grand jury specifically authorized to investigate criminal matters. So, I believe our position is clear and was clear in the briefing and has been clear here today. This -- simply there is no application of sovereign immunity in these circumstances, and this is not a lawsuit. Sovereign immunity would be -- the application here would be in contravention of decades or centuries of practice in this state. They've presented no authority to indicate to this court that this court shouldn't grant quashal on this case. And unless your Honor has additional questions, I believe our position on this matter is clear.

THE COURT: I have one last, and I'm importing from the federal side. But this notion

that summoning in an active executive, sitting president, sitting governor, sitting mayor. The executive of whatever level of government you're looking at. That's the issue. So, yes, maybe there's immunity, but there's also just the policy practicality of we don't do that because we need to let that individual perform his or her important function and when the sunsets on that administration then let's have that conversation with a person who occupied that office.

MR. WAKEFORD: Well, there is no authority again for that position in the state of Georgia. There is no gubernatorial immunity from process. Whether he is the King of the state or anything else, there is no basis in the law for a position like that. The governor is not the equivalent of the president. Additionally, I believe that they're sort of a -- they're sort of two considerations. They sort of say that he is the sitting governor and therefore, he can't be pulled in. But there is no basis for that. And there's also a citation to cases under federal law that invoked the touhy doctrine, which is specifically promulgated in federal courts to say that federal bureaucrats cannot be forced to

testify over the -- without the authorization of their superiors. That is a wholly [indiscernible] of federal law. Has absolutely no advocation of the Georgia law and doesn't impact --shouldn't impact this court's analysis at all.

THE COURT: I think the word is agents and not bureaucrats. But, yes.

MR. WAKEFORD: Pardon me.

THE COURT: That is what Touhy does. That's definitely what Touhy does. Okay. I appreciate that.

Mr. Bauer, was there anything you heard that you just can't let go by or can we transition to the next topic?

MR. BAUER: I get paid by the hour, your Honor. I have two points.

THE COURT: Okay. Not by the word, by the hour?

MR. BAUER: Right. So, I'll try to be brief.

It is not our burden to show there is a waiver of sovereign immunity, right. Constitution says we have it. It's jurisdictional. The only way the governor in his official duty can be hauled into court for any reason if there's something and

maybe you've seized on something that I haven't found that says, if it's criminal and he is a witness, he could do it. You have the authority to do it. But under the construct of our constitution we don't have to give you that authority that says you don't have the authority. They've got to show you the authority for the waiver, and they haven't done that. They've said we haven't done it, but that's flipping the burden on its head. The default is the State is immune from process absent a waiver. They've got to show you the waiver. This --

THE COURT: That is, indeed, what the law says if sovereign immunity applies to that situation. So, what I heard the State, meaning the District Attorney's Office argument to be is we don't need to point you to a waiver because sovereign immunity applies to suits, actions, etc. And you've responded. I get that. But I think the two sides are talking passed each other a little bit and definitely passed me because you don't have the burden to show that immunity applies. They need to show there's a waiver. Someone has the opportunity to show me a case that says, oh, by the way, that applies in a criminal context.

MR. BAUER: Sure.

THE COURT: I just have never seen that case.

MR. BAUER: Well, this is a civil proceeding so we haven't looked for that case for you, but we will. But the only limitations to lawsuits, claims, actions is when the general assembly -- and in that language that he pointed you to I think answers the question. I pointed you to subsection (a) of Article 1 Section 2 paragraph 9. It says "the general assembly may waive the State sovereign immunity from suit by enacting a state claims act." That doesn't say the State only has sovereign immunity for suits. It says, we're immune. That's what subsection (e) says unless the general assembly does something to reduce that. And what (a) says is we're giving you general assembly direction that one of the things you are authorized to limit our jurisdictional bar on is a state for claims act. So, general assembly, you don't have to worry about this sovereign immunity being a proper tort claims against the State because we are telling you in the constitution you can do that. You can say immune from suit by enacting a state claims act. It doesn't say these

are the only things that we're waiving immunity from or we need a waiver of immunity from.

The only other point I want to make is -- I think you sort of highlighted the slippery slope of authorizing grand jury's to subpoena a sitting governor during his term, during election -- I'll let Mr. McEvoy talk about that -- to discuss the conduct of his duties in office. You've distinguished the cases I cited for you by saying those -- maybe they're investigating DFACS and that is the scope of their authority. But what if the grand jury is investigating the mayor's office, not beyond the historical realm of possibility in this city. And what if the mayor who in past times might have been in regular communication with the governor as one would expect with two important chief executives in the same state. Does that give every grand jury that's investigating a city -- potential city crime the ability -- during that governor's term -- to say you're going to come in here and be a witness in our investigation to talk about your performance of your duties in office. I think sovereign immunity says you can't do that. You have to find another way, State, to prove your case without infringing on the chief executive's

immunities and privileges and separation of power's protections unless we've said specifically you can do it. Now --

THE COURT: Of course, the separation of powers is executive, legislative and judicial.

MR. BAUER: Correct.

THE COURT: That's the third one. Prosecution, governor, they're all in the same branch so we're not separating a whole lot when you're pitting a criminal investigation against your theory that sovereign immunity actually includes criminal investigations.

MR. BAUER: No, the reason is the separation of powers constitutional concerns. I know that Justice Blackwell would have agreed with this. Because this is not the DA issuing a subpoena to the governor.

THE COURT: It's the grand jury.

MR. BAUER: It's the grand jury in this court. And that raises a problem that Justice Blackwell has written about that I don't even know if the courts of this state could enjoin the governor in a claim in which sovereign immunity theoretically doesn't apply. So that's what I think the problem is here. We appreciate the

Court's time and attention to it.

THE COURT: You're welcome.

What's next, Mr. McEvoy?

MR. MCEVOY: Your Honor, before we turn our attention to executive privilege, if I could just respond to one issue regarding criminality of special purpose grand jury.

THE COURT: Okay.

MR. MCEVOY: I think an important distinction that you've raised, and if you look at rule 6 of the federal rules of criminal procedure and what federal criminal grand jury's are authorized to do, that's return indictments. And in our view that's the distinction between a criminal procedure and civil procedure. Even in the federal context you impanel a grand jury. You want to look at some civil FDA issue, that grand jury still has the power to return an indictment even if it starts off as a civil inquiry. I liken it to law enforcement. Did somebody have arrest powers. If they have arrest powers, it's criminal in nature. If you don't have arrest powers, it's civil in nature. And I think that applies here. And if you look at Chief Judge Brasher's order you know the only thing that they're empowered to do is

make recommendations. In this country making a recommendation about a criminal matter does not empower to become a criminal matter.

THE COURT: Does the GBI ultimately make a recommendation to the attorney general's office about whether to seek an indictment of a statewide gang matter that they've been doing?

MR. MCEVOY: So, that's a little bit different, right. I mean, there is dual jurisdiction. You know, now the FBI has dual jurisdiction. The FBI can investigate something criminally but make a civil recommendation. And we see that false claims act context all the time. It's frightening for somebody like me, but it -- but you can't have it the other way around. You can't a civil investigator have arrest powers or indictment powers just as a special purpose grand jury has no power to bring charges against anybody.

THE COURT: Okay. But my question was the fact that the GBI can't indict but they could recommend to the attorney general that he pursue an indictment following their investigation doesn't make their investigation non-criminal.

MR. MCEVOY: But, your Honor, that's not the province of a law enforcement officer. The

province of a grand jury is to return a true bill or not return a true bill. That is the entire -- as you well know, that's the forum of the grand jury. Forum of a police officer or detective, they're not empowered to bring indictments. They are --

THE COURT: Understood. But the fact that they cannot bring an indictment doesn't make their investigation non-criminal. That's all I'm getting at. And this grand jury -- this special purpose grand jury much like a GBI agent investigating something, they don't have the power to indict, but they have the power to gather information and ultimately make recommendation to the District Attorney. Hey, based on what we've got here, we think you should indict, and I think -- I'm analogizing here. I want you to distinguish it. The way that a homicide detective might say, you know what, we think you should bring this case or FBI agents would bring to an assistant U.S. attorney. We think you should bring this case. That's not a civil investigation until it's indicted.

MR. MCEVOY: Your Honor, that's not -- the role of grand jury, historically, is to either

bring criminal charges or not. This is a unique body. They're not authorized to bring criminal charges. I understand that it's related to some potential criminal case that may or may not be made down the road, but they don't have the power to bring criminal charges, and we're just trying to make distinction between criminal and civil. If you have the ability to bring criminal charges it's a criminal matter. If you don't, it's not.

THE COURT: Okay.

MR. MCEVOY: Your Honor, I was going to address the executive privilege issue. You know, some of the other issues that we're going to discuss are kind of interwoven between one another, and I just wanted to provide a little bit of context, you know, historically as to why we're here and how we're here. And, you know, one thing Mr. Wakeford said is that Governor Kemp was asked in the same way to be here as secretary of state and attorney general. I think that's not really true, and we sort of walked through that. But it's important to note by way of background that your Honor has it, Governor Kemp is just a witness in a matter. Governor Kemp is someone that's ardently defended the rule of law. He took appropriate steps

to protect the integrity of Georgia's election process. He certified the presidential election November 20, 2020, just as the constitution and state law provide. He's now been identified as a witness in this investigation. And the most important point, your Honor, he has been willing to engage in this investigation since April of 2021, despite the fact that we have the belief as Mr. Bauer explained that the Court and district attorney's office and special purpose grand jury lacked the jurisdiction to bring him in. We've been engaging voluntarily. Now we're in the middle of an election cycle for really the most closely followed gubernatorial race in the country. There may be one or two others that are close, but this is certainly up there. This is happening, coincidentally or otherwise, as this high profile and politically charged investigation of Governor Kemp's role in it are reaching a crescendo. The intersection of law and politics in this way we believe shouldn't be happening on the eve of an election. And despite our willingness to engage we're just asking that the rule of law be closely followed in this matter. And we're going to talk a little bit about, you know, the political impact

that this is all having later, but just to observe while we're talking about the special purpose grand jury that it's impaneled until May of 2023. And the District Attorney's Office has publicly stated repeatedly that it is in no rush to complete this investigation. It's likely to last through the end of this year.

THE COURT: So that I can put what you want to share in context, because the politics of this aren't my domain. You're sharing this because it goes to the oppressive nature of the subpoena if I find that it is not to be quashed because of sovereign immunity, no jurisdiction or executive privilege. I will have to hear that argument because I want to make sure there's a point. You have aired very publicly through your pleadings, and the District Attorney has provided her prospective in pleadings about some of the back and forth and tit for tat and the politics. That's not my space. So I don't want to open this proceeding up to here's how we think the race is going for the governor, and we think it has this political spin or that. I don't think this is the right forum for that, and you may not have been going there. I want to make sure there's a good purpose for you to

explore what you want to explore since the slide in front of everyone says "political impact of the subpoena."

MR. MCEVOY: I'm sorry. I will get to that, your Honor. And we're asking for a quashal and modification. Quashal and/or modification on several basis. One is executive privilege. The other is attorney/client privilege, and the other is the improper purpose of the subpoena, which is sort of what this overview is meant to sort of tee up. And later in the presentation we'll be showing your Honor as your Honor has seen what the relevant policy statements are around conducting an investigation like this during an election cycle. So our position, your Honor, may disagree. Our position is within your Honor's province to take some action if your Honor sees fit. Listen, I don't want to repeat everything we've said in our brief, and I do want to be very respectful of the Court's time, but given the importance of this matter to Governor Kemp, I do want to be thorough.

THE COURT: We'll strike the right balance.

MR. MCEVOY: I'm working on it. The one thing that is a little bit unusual, and there are a

lot of things that have been unusual in how this has been handled. Just in my experience, it's our effort to engage for whatever reason, you know, this interview that was suppose to happen by September of 2021, didn't happen. It didn't happen in the beginning of 2022. It matriculates into the spring pass the primary. At that point we asked that it be pushed and the district attorney's response was that it's unable to agree to push the date of a future voluntary interview pass the date of the general election. That's curious to us. I'm not sure why that is, and I'm sure that the district attorney will talk about that. But in that time frame it only serves to increase the risk of an unfavorable political impact which we'll get to. And so, you know, I just say that as to kind of tee up the discussion around executive privilege which is one of the things that we have been trying to discuss with the district attorney's office as this court hasn't encouraged with other witnesses since April of '21.

So, I want to talk about the application executive privilege generally, and then also specifically to this case. And the latter is a little bit more complicated because we learned

about what they wanted to talk about for the first time on Tuesday evening. But I want to address the application of it generally, and I think, your Honor, in our papers we made it pretty clear that courts in other states have applied executive privilege to governor's.

THE COURT: And so just as a starting point you acknowledge that there is no codified either in statute or case law executive privilege in Georgia. You're seeking to import that concept to this situation?

MR. MCEVOY: That's right. In the State's response -- I mean, this was a little bit unusual for me that the State said more notably having the remaining 49 states rush to bestow such privilege the executive -- upon their respective governor's. By way of example, see State, ex. Rel v Dunn, which is an Ohio case. And then they have this quote. And so, we looked at that case and low and behold they cited a dissenting opinion. So, the only case that they cited that says executive privilege does not apply to a governor. Actually, says it applies to that governor.

THE COURT: In Ohio?

MR. MCEVOY: In Ohio. And that case says

the governor has an executive communication privilege that applies to communications to or from the governor when communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policy making and decision making. The State then goes onto say -- the DA's Office then goes onto say, special prosecutor goes onto say, movant cites only two cases to support the claim that several states have found the existence of this executive communication privilege. I thought that the pleading being 121 pages was probably long enough, but you know, for your Honor and the district attorney's review we've got 10 other cases that I was going to make reference to. And rather than, you know, repeating the cites out, if I could approach and provide these to your Honor, and I've also included a copy of the attached decision.

THE COURT: Before you go further with executive privilege, I may have misunderstood in your original brief. Are you arguing that executive privilege precludes all testimony or it like attorney/client privilege, legislative privilege would cabin the governor's testimony should he testify in certain ways. Because if it's

the latter, I don't -- you do need to articulate why you think there is such a thing in Georgia. But beyond that, I think we would need to work through after we conclude today that threshold question of is the subpoena quashed or not. If it's not, then I think the governor falls into the same broad category as many other witnesses who have come before the special purpose grand jury where you and your colleagues, the district attorney's representatives and I would sit down and say, here's a safe area, an allowable area or not. I don't think we'll do that here and now.

MR. MCEVOY: Well, that is a great suggestion and one we have been trying to facilitate for 18 months. I'm happy to go through a couple of analogous cases that have similar findings, and the cites are all in front of your Honor. In the state of Washington in the Freedom Foundation case, the Court held that the executive communication privilege applies to communications, authored, solicited or received by the governor or aids for purposes of fostering informed and sound gubernatorial deliberations, policy making and decision making. In New Jersey in the Nero case the governor has privilege to protect

confidentiality communications pertaining to the executive function. In California in the --

THE COURT: I see they're all listed here.

MR. MCEVOY: They all apply to the governor, your Honor. So, you know, just -- I understand your Honor's point, this is not a case directly on point in Georgia saying the executive privilege applies to the governor in the same way that it applies to the president. But the attorney general's position is that it does. It's consistent with 10 other states who have found the same thing. And there is not a single case that we've been able to find or that's been identified by the District Attorney that says it does not. In other words, no other state has come out and said the executive privilege does not apply to the governor. I don't know what else really to say about the potential theoretical general application of the executive privilege to the governor. I think it's pretty clear. But to your Honor's point I'm happy to kind of move onto the specifics.

THE COURT: Okay.

MR. MCEVOY: And Judge, this does require a little bit of context, if you will indulge.

You know, one of the things that since we first engaged with the district attorney's office in April of 2021, when we were dealing with the initial prosecutor Sonya Allen. We spoke with her in April of '21, and they indicated they may want to speak with the governor. We asked if we could come in and discuss areas of inquiry. They didn't respond to that. I wrote an e-mail to the District Attorney on June 16th, made the same request. I said it may facilitate the process if we could have a conversation about the areas of inquiry. That never happened. And as your Honor is well aware, I think there are five or six other requests where we have asked to come in and sort of give a proffer of testimony so that we can facilitate these complicated evidentiary issues despite our belief that we have no obligation to do so. And so, I thought that, you know, this issue of an attorney proffer has become kind of a controversial issue in this case. And I think your Honor has a understanding of what an attorney proffer is, but I just wanted to go over my understanding and what we'd hoped to accomplish. Because in my experience, both as a federal prosecutor and a defense attorney, an attorney proffer is one of the

most commonly used tools in any significant investigation. The purpose is to afford --

THE COURT: So it is frequently used, but it takes two. And if the district attorney's office isn't interested in doing that, and they think that's the way to move forward is a subpoena, we got to where we are. So I'm going to ask you to focus on the subpoena, why it applies, why it doesn't. If it does apply, how you think it ought to be.

MR. MCEVOY: I appreciate that, your Honor. But your Honor did ask why we're here and how we got here. We did agree -- the district attorney's office did agree in writing to allow us to conduct an attorney proffer.

THE COURT: And then that didn't get to happen.

MR. MCEVOY: And then everything changed. On June 13th it's unilaterally revoked. We had a date. They asked for dates for attorney proffer. I gave them dates. June 24th to June 27th. This was anticipation of a voluntary interview July 25th. And on June 13th we get the rug pulled out from under us. There will be no attorney proffer. Actually, we've given August dates, and then on

June 13th the special prosecutor said those dates are no good. You're not doing an attorney proffer. Governor's got to come in sooner. And, you know, if you don't give me new dates within 48 hours we're going to issue a grand jury subpoena. This is the first I've ever heard of a grand jury subpoena because we've been operating in good faith for over a year. And I noted the change in tone and said there is no reason to threaten a grand jury subpoena. I got the it's not a threat, it's a promise. And I think the last time I heard that line I was riding around in a big wheel. But we understood the position had changed. So, we provided those dates within 48 hours, but the hope was that we could still facilitate some conversation about the subject matter that would be discussed with the sitting governor who is agreeing to voluntarily come in. Okay. It didn't happen. And so, you know, what is interesting is what has happened since. You know, it's somewhat -- you know -- even when your Honor was conducting a hearing on June 22nd regarding some similar issues, and you know, Ms. Pearson asked at a minimum you asked the State and DA's Office to provide buckets to us before the people are brought in. Your Honor

said that's a fair request and sort of worked through it, and that's what we have been trying to do. And, you know, whether one is an experienced prosecutor or leading an investigation like this for the first time, I'm just troubled by the fact that we weren't treated like --and we were not given the ability to discuss these important evidentiary issues. And you know call me a wordy word, but I don't think I would be doing any client a service, let alone the sitting governor, if I were to walk that client into a meeting unprepared, not knowing the first thing what's going to be talked about. And all we were told is well, we want to talk to him about some conversation between the secretary of state and the president that he wasn't on, and what he knows about it and what he doesn't know about it. Well, we have now learned for the first time in a public filing on Tuesday night that the areas of inquiry are much more detailed and much more significant. And so, you know, talk about the politics of all this and political impact regardless of whether it's politically motivated or not the ABA and DOJ policy focus on political impact. This clearly has a political impact. It has a political impact when a

public filing for the first time you list all these areas of inquiry. And so I don't know what purpose that serves. In other words, I'm trying to figure out why we were not able to have that conversation with the district attorney's office that we've been requesting for over a year. And as your Honor is aware the tone changed things. You know, became for some reason adversarial. And all that we were asking in advance of what ultimately became July 25th, voluntary interview, were just standard prophylactic measures that any prudent attorney would take before bringing someone into investigation. Particularly if, as the district attorney's office says, it's a criminal investigation. I take those things seriously, Judge. And so to your Honor's question, the answer is I don't know. You know, there is a lot of information here on this page. They're talking about phone calls between people that we were never involved in. They go through this detailed, you know, litany of information that's never been discussed with me, and therefore, I've never had the opportunity to discuss it with my client. And they end by saying "the District Attorney submits that the above clearly relevant information is just

the start of what may be revealed through the movant's grand jury witness testimony." So there's a lot there to unpack, and we would just renew our request that we be given the opportunity to discuss that with the district attorney's office as your Honor has suggested in other cases. And by the way, I think I have probably been involved in more than a hundred attorney proffers as a prosecutor and defense attorney. I have never had the experience of a prosecutor telling me that she wouldn't let me come in and hear what I had to say. And as a prosecutor I've never told someone you can't come in and proffer evidence. Because I know how helpful it is to the process. And I'm also not familiar -- I have practiced all over the country, and I have never had any state or federal prosecuting agency tell me that there was a policy against an attorney proffer. So we have been trying to come in voluntarily, facilitate the dialogue to discuss executive privilege, attorney/client privilege, those types of things. They have rejected at every turn. And then for the first time they do what we were asking to do, but they do it in a public filing. So, I'm at a little bit of a disadvantage to talk about the specific

application of the executive privilege without knowing as your Honor has said what the questions might be how they're asked, what the subject matter is. We've got to be given that opportunity to do that, and certainly would not allow any client to go into the grand jury separated by counsel and have to parse through, you know, these very complicated privileges, whether it's attorney/client privilege or otherwise. So, you know, what we have proposed repeatedly and will propose again-- I don't know if it's within your Honor's power to do it now, but it's very simple, Judge. And as Mr. Bauer said we're a little frustrated, too. If the district attorney's office agrees to address these outstanding evidentiary privilege issues an attorney proffer in advance of a voluntary interview that takes place after November 8th, all of these issues will be resolved. As Mr. Bauer said, we can't waive sovereign immunity, but we'll do what we've said from day one and come in voluntarily, and that's all we have been trying to do, Judge. I think that executive privilege pretty clearly applies if we're talking about it generally. Whether it applies specifically on subject matter they want to ask him

about, the answer is, I don't know, it depends. We have been able to identify certain things where we don't think it applies. Happy to talk to him about it. We just haven't had that conversation.

THE COURT: When you say come in for a voluntary interview, and from some of the exchanges that I've had with you and the district attorney's office always present together, there 's the notion of an interview as in before the grand jury because they're the body that will be issuing this recommendation and so they might have questions that the prosecutor didn't think of versus a voluntary interview solely with the district attorney's office? So, it's a voluntary interview before whom? Assuming these other attorney proffer happens, you work through concerns about privilege, all three of them, etc., that's a voluntary interview in front of the grand jury? It's a voluntary appearance, in other words?

MR. MCEVOY: It's exactly what we had agreed to. A voluntary interview with the district attorney's office. That's what was scheduled and what became publicized on July 25th in advance of that after the attorney proffer was canceled by the district attorney's office. In last ditch efforts

in discussing these issues in advance we sent an e-mail on July 20th that, you know, everybody's seen, where we asked to discuss the topics in advance -- some questions in advance to deal with these issues. In response to that July 20th e-mail the interview was canceled, grand jury subpoena was issued. Here we are.

THE COURT: So the conversations that you and Mr. Wade and others and I had about finding a date that works not just with the governor's schedule but yours, I thought that was for an appearance before the grand jury and not -- I don't need to get in the middle of -- I ought not to be asked to get in the middle of setting up an interview. I was brought in because there were concerns about the reasonableness of the district attorney's office's insistence on a particular date for an appearance before the grand jury which we can call interview. I don't really care what label you put on it, but it's structurally different as, you know, appearing in front of the grand jury versus sitting down with representatives of the DA's Office. So, I don't want to misunderstand what you're describing. Not that I get to enforce any of this other than I'm being asked to enforce

or quash the subpoena. But what you can negotiate with the DA's Office that's your powers of persuasion and what not. So, that's where I'm confused.

MR. MCEVOY: Well, your Honor, I'm just trying to tell you what happened. We had an agreement for a voluntary interview. We had an agreement to conduct a proffer session on either June 24th or June 27th. That agreement was unilaterally terminated on June 13th. We were told to give dates sooner than August for voluntary interview or a grand jury subpoena would be issued. We did do that with the hopes of continuing to have a dialogue of previewing some of these topics in advance to facilitate conversation and not having to come before your Honor, which we would have certainly have to have done multiple, multiple, multiple times. And then in an effort when I made those requests in advance of a voluntary interview on July 25th, that offer for voluntary interview was revoked. We were issued a grand jury subpoena on July 29th. It was at a time when I was planning to be in the middle of the Grand Canyon going down the Colorado River. And your Honor and the district attorney's office was kind of enough to

push it back one week. It was during that period of time we were trying to assess what our options were put into this box where we then had to invoke sovereign immunity because we still were not given any clarity about what would be discussed. And it wouldn't be proper for any lawyer to take their client in let alone the sitting governor of the state of Georgia under those circumstances. And this has all been sort of highlighted and very well reported in the media, and that will get to the discussion that we have later about the political impact. But it -- we did not want to be here.

THE COURT: So I'm clear, voluntary interview is different from grand jury appearance?

MR. MCEVOY: Right.

THE COURT: Okay. All right. Thanks. I guess I will hear from the district attorney's office. I guess we're talking about executive privilege. If you feel compelled to engage on the back and forth with the e-mails and invitations, do so. Very, very briefly, I'm more interested at this juncture hearing about executive privilege if that's something you want to respond to.

MR. WADE Very briefly, Judge.

THE COURT: Always makes me nervous. Not

just from you.

MR. WADE: It just has become abundantly clear to the State that Mr. McEvoy is going to respond in a manner that he gets across a message that's not even relevant. The Court has insistently, consistently stated to Mr. McEvoy and our side that the Court is not interested in hearing certain aspects of even the pleadings. Mr. McEvoy has ignored that as he has done through this process. He has ignored our communication. He's ignored clear communication to him because he wants to drive the way that the State is proceeding with its investigation. Mr. McEvoy clearly is not in favor of the State electing to not move forward with an interview outside of the grand jury process or the special purpose grand jury room. The State has elected to do that. That is not Mr. McEvoy's call. That rests solely with the District Attorney and the District Attorney has made that decision through the power of the special purpose grand jury. Mr. McEvoy starts to talk about an e-mail exchange between the two sides, which the Court has clearly stated it does not have an interest in, and we would not go there. However, Mr. McEvoy made specific reference to his e-mail, and I'd like to

address that briefly here. In Mr. McEvoy's e-mail he outlines requirements. He said these are the requirements for our client to come and sit and speak with you. One of the requirements is we're to get in advance --well, in advance each and every question that's to be asked. Well, that's his call. And that's not the State's position. The State's position was that his client would come in and speak in front of the special purpose grand jury just as a host of 30 plus other witnesses have done. That's all. At that juncture, Judge, during the course of the interview, what really broke down the conversation was within the e-mail. Mr. McEvoy says that the only way that that interview would take place, the only way that a voluntary interview would take place is if we didn't record it. Well, our intent was to record it so that the special purpose grand jury could see and hear for themselves what the testimony was. Accurately. Well, that's an issue. We can't record it to show the special purpose grand jury accurately what is reflected during the course of the questioning, then it becomes too much of a control issue. Mr. McEvoy was attempting to control our efforts to ascertain the information that we were seeking.

Now, I did say briefly, that's brief. However, I will allow Mr. Wakeford to come up and address the other issue for the Court.

THE COURT: Thank you for sharing that.

Mr. Wakeford?

MR. WAKEFORD: Your Honor, each witness who has come before the special purpose grand jury and raised an issue of privilege, if the parties, meaning members of the district attorney's office and counsel for that witness cannot come to an agreement about the application of that privilege, it is elevated to your Honor and decided based on the specifics of the situation at hand. That is still available. And if the governor appears to testify, that process will still be in place.

THE COURT: True. What about the threshold argument that executive privilege, if applied in Georgia, would bar all testimony because the inquiries are about what the governor did in the exercise of his office?

MR. WAKEFORD: I have -- I'm not sure if I understand their argument to be that all inquiry whatsoever into anything the governor did is barred by a claim of executive privilege. I believe it would be the process of deliberation before a

decision is reached. Anyway, any arguments about executive privilege don't go to factual determinations which privilege doesn't touch. Whether something happened, whether something was said is not reached by privilege. And so the total quashal, the absolute quashal of a subpoena which they're seeking is just not appropriate. This is again something we could talk about again on a question by question basis if your Honor is participating in the process.

THE COURT: So if it applies you'd analogize it to legislative privilege which precluded some area of questioning for certain witnesses but allow others. And you'd work through that either as you've described it, the lawyers sorted it out or as group we sorted it out?

MR. WAKEFORD: That is just a reflection of the sovereign immunity argument. It's just the same. It's the same argument where I don't know whether it was in jest or not, but the governor is the King. The governor is the State and body, and therefore, this court has no authority to tell the governor to do anything. That's the same thing with the executive privilege argument, and that is not the case. There's no recognized gubernatorial

privilege in Georgia, first of all. And second, it would have to be tailored to actual questions which are being asked.

THE COURT: Okay. Thank you.

Mr. McEvoy, you're back up. Not much of a rest for you.

MR. MCEVOY: No. And I'll be brief, your Honor. I know that your Honor does not seem to be too receptive to this argument, but I would like just to be able to brief it.

THE COURT: I'm open minded. Expand my horizons.

MR. MCEVOY: I will say on executive privilege it applies to document and other materials that reflect presidential decision making, and it applies pre-deliberative and post decisional material as well. So our view it is pretty broad. I agree with the DA's Office. We may be able to carve some things out that he could talk about is what we've been trying to do. I'm happy to do it under the right circumstances. The problem and final ground that we believe is appropriate for quashal is because of the significant political impact that this investigation has had on Governor Kemp. The timing

of the investigation, it's political impact have reached a point we believe where it has been violative of existing DOJ, ABA, the National Prosecution Standards. And they all direct that any political impact should be avoided. Quote. "Such investigative action that could impact the outcome of an election is greatly diminished once voting has concluded." The ABA's criminal justice standards provide similar guidance. These standards which are quote "intended as a guide to conduct for a prosecutor actively engaged in a criminal investigation or performing a legally mandated investigative responsibility state when due to the nature of the investigation or the identity of the investigative targets any decision will have some impact on the political process such as an impending election. The prosecutor should make decisions and use discretions in principle manner and a manner designed to limit the political impact without regard to the prosecutor's personal political beliefs or affiliation." And finally, the ABA, the Criminal Justice Standards 3.6 on prosecutorial investigation says, "whether one agrees that this investigation -- what I just read was from the ABA. And so there's been discussions

about whether this investigation is politically motivated, whether it's not. Whether one agrees that it is politically motivated or not, I think there's some evidence to suggest that no one can deny that this investigation had and continues to have political impact which is the standard under the relevant policies. I've got a couple of exhibits. Exhibit C and Exhibit A that I would just like to publish, your Honor. And these are just represented examples of what happened out in the world hours after we believe we were forced to file our motion to quash.

THE COURT: Okay.

MR. MCEVOY: So look, I understand you've got political candidates trying to gain traction with some segment of voters, but as an attorney and not a politician it doesn't sit with me, and doesn't sit well with policies that I've just enumerated. Obviously, we've discussed and debated, had very reasonable debate about a refusal to testify. I don't think it's because he'll do anything to win an election, right. So these things happen, as I said hours -- that's 9pm on April 18th. I think we filed our motion that day. It's having a political impact.

THE COURT: What's having that impact was the decision to file the motion. I will do my best to refrain from descending into the political chaos that I know some folks really really want to talk about, and the pundits can do that. But is -- was not setting aside the sovereign immunity concern -- and I'm not minimizing those in anyway. Setting those aside, would not the path of least resistance, least attention, least political fire from any direction to have been we agreed on a date. You were available. You had confirmed the governor was available. Appear. Come in through a secure entrance. Leave. It's a non-event. I may be missing it. But because it's in your brief and because you argued, look, this is -- these political impacts, it's not fair and per all the policies that you correctly cite, DOJ, ABA, etc. Isn't the answer how about November 15th to come in for whatever coming in means. Right now that's not the posture we're in. But Z happened because what had originally been negotiated didn't happen.

MR. MCEVOY: That's right.

THE COURT: Okay.

MR. MCEVOY: Is that where we are, Judge, in society in our legal system where I don't

believe anyone should be punished politically or otherwise for invocation of a legal right or privilege. That's what happened here. We didn't want to be here. We agreed to something. They disagreed. They created a controversy. We had to respond. Who benefits from that controversy? Not Governor Kemp. He doesn't benefit from that. And I don't think it's fair to punish Governor Kemp from invoking a legal right of privilege. That, by the way, he doesn't have the authority to waive sovereign immunity. And by raising it, was he hiding? Judge, we're still a society that's governed by the rule of law. The District Attorney's Office is free to pursue any type investigation without fear, but it also must do so without favor and without the threat of impacting our election integrity. That's something Governor Kemp has fought very hard to protect and maintain. And the district attorney's office has said they don't want to have a political impact. I appreciate that. So the easiest thing to do is kick this down the road 75 days. Your Honor is well aware of where we are, what state we're in, what race we're facing and, you know, the governor ought not have to suffer political consequences for

invoking a legal right. I think the district attorney's office would agree with that. And so, in our -- it's our position there's a very simple solution for that. I don't understand why his appearance has always been tied to coming before the general election, but it has. This investigation is going on until the end of year anyway. Special grand jury is impaneled until May of '23. I don't see any significant investigative harm to pushing it. It's consistent with DOJ policies. It's consistent with ABA policies. And that's all we're asking for.

MR. WADE: Before we respond we got kind of lost in the argument. Two screens ago Mr. McEvoy posted an opinion by the attorney general that specifically referenced a criminal investigation to criminal statute. Well, not 20 minutes ago the argument was this wasn't criminal. So we got kind of lost in the argument. Is it criminal or is it not? Was is their position? Because if it's not criminal then that slide two screens ago would not be applicable. So, we're just trying to figure out which side does the Court want us to argue.

THE COURT: I want you to argue your

side, whatever that may be. I noticed the situation that you noticed. You don't have to sigh everytime you come up.

MR. WAKEFORD: So, refraining from sighing, your Honor. The District Attorney publicly stated earlier in 2022, that although this special purpose grand jury was impaneled in May it would not begin conducting business until June, specifically, to avoid public activity, in order to avoid interference with the political primaries which were decided in late May. In those contest, perhaps, no one was more visible for obvious reasons than the governor's own contest against an opponent whose involvement and opinions about the matters relevant to this special purpose grand jury could not have been more public, more vehement or more vitriolic if you watch the debate between the two individuals before the governor's primary. That was a specific delay which the District Attorney publicly stated she would take. She would decide to pursue. After communications breakdown there is a -- well, they breakdown because of a July 2022 e-mail in which requirements for the governor's voluntary interview are stated by Mr. McEvoy and the word "requirements" is very

specifically used. Another phrase that is used in that July 20th e-mail is a politically motivated investigation. It has been their position since before the voluntary interview was -- could not move forward before a subpoena was issued. This was their stated position that, well, this is a politically motivated investigation. They put it in writing to us. What is the District Attorney suppose to do with that when she has already tried to move the date of any involvement pass an entirely contentious primary that the governor was participating in. When the District Attorney had engaged in negotiations to have a voluntary interview even after the special purpose grand jury was seated and was subpoenaing other witnesses. As in deference to the respect afforded the office of the governor, communications and negotiations about voluntary interview continued until requirements were stated by the governor's office. Because in their words this was clearly a politically motivated investigation. At that point what more is there to discuss? There was an agreement to a date after a subpoena was issued. There was an original subpoena date, and then there was a conversation which your Honor participated between

the parties where counsel for the governor pointed out I can't do that date. For personal reasons I can't be there on that date. So, there was an agreement among the parties that another date eight days later would be appropriate. That was agreed to. Another subpoena was issued and accepted. And on the day before that agreed to day of the 18th they filed this motion. All of these issues existed. All of these positions they have didn't arise in the eight days -- seven days between when they agreed to a date and they filed their motion.

And finally, I think this is very important to understand where they're saying they're being persecuted for raising this position. Or they decided to raise it on the eve of a date that they agreed to specifically after requesting that it be moved.

Additionally, the media -- as we point out in our brief the media had already reported, incorrectly as it turns out, that the governor had appeared and provided testimony, whether it was a voluntary interview or before the special purpose grand jury. This was reported in the media widely that on July 25th the governor had appeared and provided testimony. No one from the district

attorney's office contradicted that. No one from the governor's office contradicted that. The story was over. There were no statements by anybody else. There was not a fire storm. There was not an eruption of controversy; it was quiet. If the governor had appeared on August 18th, driven into a secure location and brought into the building, appeared, provided testimony, left, there would have been no story. There would have been no controversy. There would be no political implications. There would be nothing to talk about because the story for media purposes was over. There was no testimony to hear about because it had already happened. But instead they waited until the day before the governor was suppose to appear, the date they agreed to, and then they filed this motion and made public statements about how they could not cooperate at this stage. So, to continually insist that this is a situation engineered by the district attorney's office to the intentional detriment of the governor is just not true. The facts before the judge make that clear, and to insist otherwise -- well, your Honor can make your own determinations about the validity of those arguments. That is the District Attorney's

position as to this. If he'd just come in we had talked about these issues even with you that day there would have been no story because the story was already over. Instead the governor's counsel created the story by not just choosing to file the motion, but choosing to file it in this way after getting the date that they requested. Thank you.

THE COURT: You're welcome.

MR. MCEVOY: Your Honor --

THE COURT: So, I don't want to hear anymore back and forth about who had what agreement, about voluntary interview or not and dates. I'm now familiar with the timeline.

MR. MCEVOY: Sure.

THE COURT: And of course, none of this impacts sovereign immunity and jurisdiction, but it does go into if that argument fails how do we structure things going forward. And I feel very comfortable now that I understand not every aspect of the back and forth but enough to make some informed decisions. So, if there are other topics you want to cover, Mr. McEvoy, in connection with the motion you filed that brought us here in a public setting, I'm happy to hear other topics.

MR. MCEVOY: Well, I want to reiterate its

impact. It's not intentional. It's political impact. No one has denied there is significant political impact and that's the concern. And certainly would have been impactful had we gone in voluntarily on July 25th and given a statement which we're not fully prepared, and it was recorded. And one of the things we asked for was to enter into a nondisclosure agreement so it wouldn't -- they wouldn't do that, right. So then we bring in the governor to a voluntary interview that, you know, they put in a publicly available documents so everybody would know about it. And if it didn't go well and there was no 6(e) grand jury secrecy protection, what would have happened. I mean, we are damned if we do, damned if we don't. We come in, it's going to be politicized. If we don't come in, it's going to be politicized. We invoke legal rights, it's politicized. And we are just in a difficult position which underscores the difficult balance of conducting a high profile political investigation in the middle of an election.

MR. WADE: Judge, if I might.

THE COURT: You mightn't. That's okay. Unless it's a different topic. If it's in response

to what Mr. McEvoy said, I think that was a good re-summation of what he already said. Good meaning accurate. I think it fit what he said before. Nothing new. So, if you are going to address that same thing, we've covered that turf. But if there's another topic that you'd like to cover, by all means.

MR. WADE: Another topic, Judge, but it's dealing with the issue at hand, which is we proposed that if we treat this just as we've treated other witnesses, which is that the day Mr. McEvoy comes in with his client, the morning of, we'd share with him our buckets. After we get through sharing with Mr. McEvoy the buckets he can then speak with his client. They can get their plan of action, and we can start the examination process.

THE COURT: It's a tried and trued method that has worked for many similarly situated individuals. So, I think if and when we go forward that would be the model that we'd use.

MR. WADE: Yes.

THE COURT: Mr. McEvoy, Mr. Bauer, Mr. Dove, anything else that you want to get before me since we're all together right now in connection

with the motion to quash that you filed?

MR. MCEVOY: No, your Honor. We didn't discuss attorney/client privilege, but I think the same frames parameters apply.

THE COURT: Definitely. And insofar as the governor might have a reason to raise a legislative privilege because of some whoa he had with the legislature. Preserve, protected and would be navigated if we get to that point of, oh, he's confronted with those kinds of questions.

Okay. The Power Point that you put up, is it in here somewhere; is it one of those tabs or is this just all the e-mails again?

MR. MCEVOY: I've have got an extra copy for your Honor.

THE COURT: That would be great. Before you leave if I could get that. I kept trying to find some of your slides because they come off the screen.

MR. MCEVOY: May I approach?

THE COURT: Mr. Wade, Mr. Wakeford, anything else from the District Attorney's Office at this time?

MR. WADE: Nothing else from the State, Judge. Thank you.

THE COURT: So, as I see the sequencing, I need to work through the sovereign immunity issue that the lawyers for the governor have raised that Mr. Bauer articulated here in court. If I agree with Mr. Bauer's arguments then there is no jurisdiction that this Court enjoys to enforce any subpoena and then the two sides would need to discuss other ways in which to get information from the governor if that's how things would flow. It just wouldn't be anything I have any role in. It could include appearing before the special purpose grand jury, but that would be because everyone agreed to do that as opposed to anyone was compelled to do that. If I end up agreeing with the District Attorney's/State's position on sovereign immunity or lack thereof in this context, then we'll need to have discussions about how to move forward, and I will spend sometime before we would have that discussion thinking through the concerns Mr. McEvoy raised about the political impact, not motivation, but the impact of having not just a sitting governor but a governor who is in the midst of a race for his office. Whether that should occur, his appearance before or after the election is over. So, I'll need to make both

those decisions before we would regroup. And if the decision is favorable to the district attorney's office, I will need to let everyone know my thoughts about the timing of an appearance, and then we could discuss procedural next steps.

Is there anything, Mr. McEvoy, that you think I should be working through or Mr. Bauer, that I should be working through in addition?

MR. BAUER: I just want to make sure that it's on your radar that if you are inclined to deny the motion to quash on jurisdictional grounds, that issue should go up on a --it is an interlocutory issue. It is a discretionary appeal. If you look at Turner v Giles, which is a 1994 case. 264 Ga. 812. That kind of immunity question the Supreme Court has said barring some exceptional circumstances mandating a different outcome needs to go up on an interlocutory basis.

THE COURT: I'm hearing you say two different things. It's discretionary or not discretionary. Discretionary whether the Supreme Court would hear it or discretionary as to whether I would issue the certificate of immediate review?

MR. BAUER: Both. And --

THE COURT: I guess it's always at the

top end whether they want to hear it or not. Regardless of their -- I don't control what they do. I focus on what -- so, you're saying it's discretionary, except under Turner it's not discretionary?

MR. BAUER: Well, the Supreme Court says under our appellate statute it's not an automatic right appeal. It's not considered a collateral order that you get a direct appeal without a certificate from trial court. But what Turner says to the trial court is --

THE COURT: You better issue a certificate.

MR. BAUER: So take a look at that decision, your Honor, because we will ask you in that circumstance to give us one.

THE COURT: Can you give me that cite again, please?

MR. BAUER: Yes, sir. Turner v Giles. 264 Ga. 812.

THE COURT: That's a nondiscretionary discretion.

MR. BAUER: Couldn't have said it better.

THE COURT: Yeah. The Supreme Court could say it better apparently. I will assume

there would be appellate ramifications to whatever decision I make, but I'll read Turner and see what I need to do.

Anything more from the district attorney's office?

MR. WADE: Nothing, Judge. Thank you.

THE COURT: Well, everyone, thank you for your time. Appreciate it. We are concluded here, and I will be in touch.

MR. MCEVOY: Thank you, your Honor

(Whereupon, the proceedings are concluded.)

C E R T I F I C A T E

STATE OF GEORGIA:

COUNTY OF FULTON:

I DO HEREBY CERTIFY THAT THE FOREGOING PAGES ARE A TRUE, COMPLETE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE AFORESAID. (AND EXHIBITS ADMITTED, IF APPLICABLE).

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THIS, THE 6TH DAY OF MARCH, 2023

/s/ Karen Rivers
(KAREN RIVERS), CCR-2575
RPR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF FULTON COUNTY